

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY
2000 P Street, NW, Ste. 240
Washington, DC 20036

Plaintiff,

vs.

UNITED STATES
DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES
SERVICE
1315 East West Highway
Silver Spring, MD 20910

Defendant.

Civil Case No.

COMPLAINT

PRELIMINARY STATEMENT

1. This is an action brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, to compel the United States Department of Commerce, the National Oceanic and Atmospheric Administration (“NOAA”), and the National Marine Fisheries Service (collectively as “NMFS”) to grant Plaintiff’s FOIA fee waiver request and to disclose documents withheld based on NMFS’s improper denial of Plaintiff’s request for a fee waiver. FOIA requires that federal agencies respond to public requests for documents, including files maintained

electronically, in order to increase public understanding of the workings of government and access to government information. FOIA also requires that FOIA fees be waived or reduced if disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

2. Plaintiff Public Employees for Environmental Responsibility (“PEER”) is a non-profit organization with tax-exempt status dedicated to research and public education concerning the activities and operations of the federal government.

3. Plaintiff submitted to NMFS a joint FOIA/Privacy Act, 5 U.S.C. § 552a (“PA”), request on March 8, 2012 requesting records concerning (1) all evaluation, incidents or other files on Mr. Jonathan Lee Combs maintained within the NMFS; (2) all communications with observer contractors or other third parties that mention Mr. Combs; and (3) any documents or instructions that reference Mr. Combs. In this March 8, 2012 request, Plaintiff included a fee waiver request.

4. By a letter dated March 12, 2012, NMFS acknowledged receipt of Plaintiff’s FOIA request and designated it NOAA FOIA Request No. 2012-00249. By a letter dated April 4, 2012, NMFS denied Plaintiff’s request for a fee waiver on the grounds that NMFS found it unlikely that records relating to a single observer would significantly contribute to the public’s understanding of the larger observer program.

5. In a letter dated April 19, 2012, Plaintiff appealed NMFS’s fee waiver denial of its FOIA request. NMFS acknowledged receipt of this appeal by a letter dated April 25, 2012 and again informed Plaintiff that its request for a fee waiver was denied because it classified Plaintiff as an “Educational and Non-commercial Scientific Institution Requestor” under 15 C.F.R § 4.11(k)(1)

(2012). In addition, NMFS listed the estimated breakdown of the Plaintiff's FOIA duplication costs.

6. In a final decision dated May 30, 2012 NMFS responded to Plaintiff's FOIA appeal of May 19, 2012, denying it and informing Plaintiff of its right to obtain judicial review of this denial of the FOIA fee waiver appeal as provided for in U.S.C. § 552(a)(4)(B).

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to Freedom of Information Act, 5 U.S.C. §552(a)(4)(B). This Court also has jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction).

8. This Court has the authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

9. This Court has the authority to award costs and attorney's fees pursuant to 28 U.S.C. § 2412 and 5 U.S.C. §552(a)(4)(E).

10. Venue is properly vested in this Court under 5 U.S.C. § 552(a)(4)(B) because the Plaintiff resides and has its principal place of business in this district.

PARTIES

11. Plaintiff PEER is a non-profit public interest organization, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, Arizona, New Jersey, and Tennessee.

12. PEER is not a commercial enterprise for purposes of the fee waiver provision of FOIA. *See* 5 U.S.C. § 552 (a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy,

research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resources management, public funding of environmental and natural resource agencies, and ethics in government.

13. Informing the public about these important public policy issues is central to PEER's mission. PEER educates and informs the public through news releases to the media; PEER's website, www.peer.org, which draws between 1,000 and 10,000 viewers per day; and PEER's newsletter which has a circulation of approximately 20,000, including 1,500 environmental journalists.

14. NMFS, is a division of NOAA, within the Department of Commerce, and is an agency of the United States as defined by 5 U.S.C. § 552(f)(1). NMFS is responsible for the stewardship and management of the nation's living marine resources and their habitat within the United States, and is improperly denying Plaintiff's fee waiver request.

FACTS

15. Mr. Jonathan Lee Combs, was a Fisheries Observer for the NMFS Pelagic Observer Program (POP), from 2006 to July 28, 2011. The NMFS program manager, coordinator and support staff for this program were, respectively, Lawrence (Larry) Beerkircher, Kenneth Keene and Sascha Cushner. Mr. Combs' immediate supervisor was Chad Lefferson of IAP services, Inc., the contracting company that hired Mr. Combs. During his time as an observer, Mr. Combs made thirty-three trips comprising of nearly 400 sea days for the POP. He also has prior experience in the North Pacific Groundfish Observer Program, the Hawaii Observer Program and the Shark Observer Program out of the Panama City Lab.

16. Mr. Combs' primary issue with the POP pertains to his employment termination. His secondary complaint concerns numerous events where he believes NMFS violated laws and regulations and the mismanagement of the POP. In addition, he contends that the NMFS broke the law, allowed fishing vessels to break the law, attempted to coerce Fisheries Observers to break the law, pressured Fisheries observers to take unsafe assignments and neglected medical support to Fisheries Observers.

17. On July 29, 2011, Mr. Combs received an e-mail from Mr. Lefferson that NMFS POP would no longer be using his services because of difficulties in working with him. In his e-mail to Mr. Combs, Mr. Lefferson referred to an email sent to Ms. Cushner by Mr. Combs on July 20, 2011. In that letter, Mr. Combs asked very simple and specific questions in a non-offensive, non-threatening manner regarding why NMFS had allowed vessels to break the law regarding observer safety and accommodations.

18. Instead of providing answers to his questions or concerns, NMFS staff fired Mr. Combs with no discussion or cause. The NMFS staff did not give any specific reasons for this decision other than the e-mail by Mr. Lefferson. In addition, Mr. Combs had not received any warning, nor was he informed of any wrongdoing, or told that his performance was subpar. Mr. Combs had gone through debriefing after his e-mail to Ms. Cushner and was not informed of anything wrong with his performance. The NMFS staff simply told Mr. Lefferson that they would no longer be using Mr. Combs' services for the POP, because of his July 20, 2011 e-mail to Ms. Cushner.

19. This practice is in direct conflict with POP's recent performance evaluation protocols under which an observer would get a verbal warning, a written warning and then dismissal under a "3-strikes, you're out" policy. Mr. Lefferson informed Mr. Combs of these protocols in an email on July 25, 2011.

20. After receiving the aforementioned protocols in the e-mail dated July 25, 2011 from Mr. Lefferson, Mr. Combs requested clarification from NMFS to which he never received a reply. He received nothing from the NMFS regarding these protocols. Mr. Combs merely wanted to express the need for transparency and fairness in his performance evaluations, which was met with complete dismissal by NMFS with no official response.

21. On March 8, 2012, Plaintiff filed a FOIA/PA request with the NMFS seeking documents relating NMFS observer program and in particular whether the program is being mismanaged. Specifically, Plaintiff requested records concerning (1) all evaluation, incidents or other files on Mr. Jonathan Lee Combs maintained within the NMFS; (2) all communications with observer contractors or other third parties that mention Mr. Combs; and (3) any documents or instructions that reference Mr. Combs.

22. Plaintiff contends that the sought documents will reveal whether observers were pressured to overlook violations or were punished for reporting such violations. Citing 5 U.S.C. §552(a)(4)(A), Plaintiff also requested that all fees be waived because “disclosure of the information is in the public interest...and is not primarily in the commercial interest of the requestor.”

23. By letter dated March 12, 2012 NMFS acknowledged receipt of Plaintiff’s FOIA request and designated it NOAA FOIA Request No. 2012-00249. By a letter dated April 4, 2012, NMFS, through NOAA FOIA Officer, Wendy Schumacher denied Plaintiff’s request for a fee waiver request citing 15 C.F.R. § 4.11(k) and on the grounds that NMFS found “it unlikely that records relating to a single observer would significantly contribute to the public’s understanding of the larger observer program.” In the same letter the NMFS stated “In sum, we find it unlikely that

records related to this single observer would significantly contribute to the public's understanding of the larger observer program.”

24. In a letter dated April 19, 2012, Plaintiff appealed NMFS's fee waiver denial of its FOIA request. Specifically, Plaintiff argued that the NMFS documents relating to Mr. Combs' experience as an Observer would be extremely helpful in providing the general public with in-depth understanding of important aspects of the observers program at large. While a certain segment of the population has a keen interest in the sustainability of fishing harvests off America's coasts as well as the negative impacts of fishing practices on federally listed threatened and endangered species, the broader public interest served by this request concerns whether the NMFS fishing observer program is being mismanaged. In addition, the general public has a keen interest in whether observers are being pressured to overlook violations or are punished if they report such violations. Through this request, the public can see whether NMFS has downgraded performance evaluations, limited assignments, blackballed from future assignments or condoned any or all of the above in a case where an observer complained of violations. The release of these requested records will contribute significantly to public understanding of the governmental activities, specifically, how well the NMFS observer program works in accomplishing its central resource protection mission, protecting its personnel and treating observers fairly.

25. NMFS acknowledged receipt of this appeal by a letter dated April 25, 2012 and again informed Plaintiff that its request for a fee waiver was denied because it classified Plaintiff as an “Educational and Non-commercial Scientific Institution Requestor” under 15 C.F.R § 4.11(k)(1) (2012). In addition, NMFS listed the estimated breakdown of the Plaintiff's FOIA duplication costs.

26. In a final decision dated May 30, 2012, NMFS, through the Department of Commerce, responded to Plaintiff's May 19, 2012 appeal denying Plaintiff's appeal and informing Plaintiff of its right to obtain judicial review of this denial of the FOIA fee waiver request and appeal as provided for in U.S.C. § 552(a)(4)(B).

27. In the same letter NMFS stated "information relating to only a single observer will not provide the public with an understanding of the observer program at large or reveal problems with the observer program at large." Furthermore, NMFS maintained that to the extent that some of the information requested by Plaintiff may provide insight into the observer program, Plaintiff had failed to show that the information would significantly contribute to the public understanding of the specific government operations or activities at issue.

28. NMFS is improperly denying Plaintiff's fee waiver request and thereby denying Plaintiff access to properly requested agency records.

29. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

CAUSE OF ACTION

Count I: Violation of the Freedom of Information Act

30. Plaintiff repeats and incorporates by reference the allegation in paragraphs 1 through 29.

31. NMFS is improperly denying Plaintiff's fee waiver request in violation of FOIA, 5 U.S.C. § 552(a)(4)(A)(iii).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- i. Enter an Order declaring that NMFS has wrongfully denied Plaintiff's fee waiver request;
- ii. Issue a permanent injunction directing NMFS to immediately disclose the records requested by Plaintiff in its March 8, 2012 FOIA/PA request without any requirement to pay search or copying fees;
- iii. Maintain jurisdiction over this action until NMFS is in compliance with FOIA, APA, and every order of this Court;
- iv. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: Washington, D.C.
August 3, 2012

Respectfully submitted,

/s/ Kathryn Douglass
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